Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1996

STEPHEN BYRON ELLIOTT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTION PRESENTED

I. Where the Federal Sentencing Guidelines have stated that, when chemicals are seized before the end of processing, the chemicals are not considered usable in that form because further processing must take place before they can be used, and where the evidence sets forth that a chemical (ephedrine) processing operation was underway but not yet completed, was a criminal defendant denied his Sixth Amendment right to effective representation of counsel at sentencing and on direct appeal, through his attorney's failure to challenge both the inflated amount of "usable" substance (ephedrine) and the speculated amount, and type, of a controlled substance (methamphetamine) said to be possibly produced from the inflated amount, especially when the inflated amount of ephedrine and the speculation that said amount would produce methamphetamine (actual) resulted in a significantly higher sentence being imposed upon the defendant.

LIST OF ALL PARTIES

The following is a list of all parties to the proceeding in the Court of Appeals for the Eighth Circuit:

1. **STEPHEN BYRON ELLIOTT,** *Defendant/ Appellant/Petitioner;*

2. **UNITED STATES OF AMERICA,** *Plaintiff/ Appellee/Respondent.*

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OPINIONS BELOW

As to the denial of Petitioners § 2255 Motion, there are no other reports or opinions, other than the Eighth Circuit Opinion and District Court's Order, which can be found in the Appendix, beginning at A1. However, Petitioner did have his direct appeal denied by the Eighth Circuit in ***United States v. Elliott***, No. 94-1717 (8th Cir. 1994). As said Opinion was only a two-paragraph affirmance of the district court's rulings, it has not been made part of the Appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Given the Per Curium Opinion of the United States Court of Appeals for the Eighth Circuit, dated and entered on April 18, 1996, and the subsequent Mandate, issued June 14, 1996, the jurisdiction of this Honorable Court is invoked under Title 28 U.S.C. §1254(1).

The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

In pertinent part, Title 28 U.S.C. §2255 states:

> *"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, ..., or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence...An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus."*

In pertinent part, the Sixth Amendment to the United States Constitution recites:

> *"In all criminal prosecutions, the accused shall enjoy the right to...have the Assistance of Counsel for his defense."*

To prevail on a claim of ineffective assistance of counsel at sentencing, it has been held that a defendant must demonstrate (i) a deficient performance on the part of his attorney; and (ii) that the result of the sentencing proceeding was rendered unreliable or unfair as a result of counsel's deficiencies. See ***Lockhart v. Fretwell***, 506 U.S. 364, 369-70, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180 (1993).

In pertinent part, The Federal Sentencing Guidelines, Appendix C, Amendment 484, recites:

> *"This amendment addresses an inter-circuit conflict regarding the meaning of the term 'mixture or substance,' as used in §2D1.1 by expressly providing that this term does not include portions of a drug mixture that have to be separated from the controlled substance before the controlled substance can be used.*
>
> . . .
>
> *This issue has arisen in two types of cases.*
>
> . . .
>
> *The second type of case involves the waste produced from an illicit laboratory used to manufacture a controlled substance or chemicals confiscated before the chemical processing of the controlled substance is completed. . . . The chemicals seized before the end of the processing are also not usable in that form because further processing must take place before they can be used."*

STATEMENT OF THE CASE

Petitioner pleaded not guilty to charges of manufacturing methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, and proceeded to trial on January 3, 1994.

During the trial, the government called Norman Kemper (Kemper), a forensic chemist with the Arkansas State Crime Laboratory, as a witness. Kemper testified as to the amount of methamphetamine that could have been produced from the 5.6 pounds of, allegedly, pure ephedrine found in Petitioner's motor home. Petitioner was found guilty of the charged offenses and was placed in custody pending his sentencing hearing.

During the sentencing hearing of March 10, 1994, Petitioner's base offense level was determined to be a thirty-six (36). In making this determination, the district court found that the 47.15 grams of methamphetamine, actually seized, constituted "actual" methamphetamine. To this amount, the district court added 1.90 kilograms of "actual" methamphetamine, based on the entire amount of ephedrine seized from the motor home. With a Total Offense Level of thirty-six (36), and a Criminal History Category of one (I), the applicable guideline range was 188 to 235 months. Petitioner was then sentenced to term of 188 months.

Petitioner's direct appeal followed, in which, previous counsel submitted only two issues for review, to wit: (1) "The District Court Erred In Not Granting The Appellant's Motion to Suppress"; and (2) "The District Court Erred in Including The Weight Of The Ephedrine In Determining The Base Offense Level Of The Claimant's Offense". In ***United States v. Elliott***, No. 94-1717 (8th Cir.1994), the Eighth Circuit, in a two-paragraph unpublished opinion, affirmed the decisions of the district court. A subsequent Petition for Rehearing was also denied.

On November 23, 1994, Petitioner filed, *pro se*, a Motion, pursuant to 28 U.S.C. § 2255, asserting that (i) Petitioner did not receive effective representation at trial, sentencing, or on appeal; (ii) the sentencing guidelines were incorrectly applied in his case; and (iii) the district court erred in taking judicial notice that the drug involved was
D-methamphetamine rather than L-methamphetamine.

While the government filed a response to Petitioner's Motion on December 20, 1994, the Magistrate Judge, citing that Petitioner had challenged the D-methamphetamine determination of the district court, requested that the government provide an affidavit from Kemper, setting out what his testimony would be as to the type of methamphetamine involved in this case.

On February 17, 1995, the government filed an Addendum to the original Response, containing the affidavit of Kemper and a lab report showing the results of tests done on February 10, 1995, some eleven months after sentencing. According to these subsequent tests, Kemper stated that the Ephedrine was, in fact, L-Ephedrine, and that D-Methamphetamine is always produced when L-Ephedrine is used in the manufacturing process.

The Magistrate submitted a Report and Recommendation to the district court on February 24, 1995, in which it was recommended that Petitioner's motion be denied. On March 27, 1995, Petitioner, again *pro se*, filed objections to said Report and Recommendation.

On May 31, 1995, the district court, after conducting a *de novo* review of this matter, but without conducting an evidentiary hearing, denied Petitioner's § 2255 motion. Petitioner then appealed said denial.

Petitioner's appellate brief asserted that the district court erred in denying the claim of ineffective assistance of counsel, in that prior counsel failed to challenge the amount of usable ephedrine either at trial, during sentencing, or on direct appeal. Since the amount of ephedrine directly affects the amount of methamphetamine produced, the failure to argue the issue constituted a significant error in Petitioner's representation which, ultimately, prejudiced Petitioner by subjecting him to a significantly higher sentence.

Petitioner also asserted that ineffective assistance of counsel was evidenced through prior counsel's failure to challenge the district court's characterization of the speculated amount of methamphetamine as being "actual" methamphetamine. Because methamphetamine (actual) is subject to an offense level ten times greater than methamphetamine, the difference is highly significant for sentencing purposes. Again, the failure to challenge this issue resulted in the imposition of a more severe sentence.

Petitioner concluded with the assertion that, given the failures of prior counsel and resulting prejudice, the two-prong test of ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), had been satisfied. As such, the district court's denial of the § 2255 Motion was in error, and should be vacated and

remanded so, at the very least, an evidentiary hearing on the matter could be held.

On April 18, 1996, the Eighth Circuit Court of Appeals affirmed the district court's denial of Petitioner's §2255 Motion. In reaching its decision, the Eighth Circuit stated that Petitioner had failed do show that "he was prejudiced by counsel's failure to challenge the weight of the ephedrine used to project the methamphetamine he was capable of producing, because he did not rebut the testimony and test results in the record showing that the substance seized from Elliott's motor home was a quantity of ephedrine capable of producing the amount of methamphetamine that was used in determining Elliott's sentence."

No Petition for Rehearing En Banc was filed after the Eighth Circuit's decision.

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ARGUMENT

A. The United States Court of Appeals for the Eighth Circuit has rendered a decision that is in conflict with the decisions of the United States Supreme Court, and which departed from the accepted and usual course of judicial proceedings, thereby calling for the exercise of the Supreme Court's supervisory power.

As to the issue of whether or not Petitioner had adequately shown that, due to prior counsel's failure to argue against the entire amount ephedrine being used to calculate an amount of methamphetamine, he was prejudiced, Petitioner asserts that the United States Court of Appeals for the Eighth Circuit has rendered a decision that is in conflict with the decisions of the United States Supreme Court in ***Lockhart v. Fretwell***, 506 U.S. 364, 369-70, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180 (1993) and ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

According to this Honorable Court, the prejudice prong of the test for ineffective assistance of counsel is met by showing the existence of a reasonable possibility that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Strickland*** 104 S.Ct. at 2068.

In the case at bar, there were more than enough facts to support Petitioner's claim that prior counsel was deficient and, but for such deficient performance, there existed a reasonable probability that Petitioner's sentence would have been significantly lower than that which was imposed. Prior counsel neglected, even at a minimum to defend his client's interests at sentencing by failing to challenge the amount of usable ephedrine said to be from Petitioner's motor home, and failing to argue the purity of the methamphetamine, both seized and projected amounts. The result of this failure rendered Petitioner's sentence unreliable and/or unfair.

A. Amount of Usable Ephedrine

Pertinent to this case, is Kemper's trial testimony surrounding his participation in the search of the clandestine laboratory found in Petitioner's motor home. [See Appendix: 32-37].

According to Kemper, he discovered eleven (11) jars that contained both liquid and a white powder. Kemper stated that, "[a]s an examination of that particular exhibit in relation to this particular method that's been discussed for making meth, it indicated to me that the powder was being soaked. The powder was possibly ephedrine and that the ephedrine was being soaked out of the powder into the liquid, in which time it would be transferred to another container and dried down to be used." [Appendix: 35] (emphasis supplied).

Kemper also described the process of producing methamphetamine from ephedrine tablets. Kemper stated that "what the person would do was to grind the

tablets up into a powder form and soak it in water.... They would then filter that solution and dry that water down - dry the solution down until you get a white powder, which would be your ephedrine powder." [Appendix: 35] (emphasis supplied). According to Kemper, it was this particular "soaking-out" process which was going on in the motor home when the search was executed. [Appendix: 36].

Kemper went on to state, as to the taking of samples and actual testing of the substance, that he simply removed the white powder from the jars and dried it to get a drier weight of the powder. [Appendix: 35]. The substance was then subjected to a series of chemical screen tests, as well as a Thin Layer Chromatography test and Infrared Spectroscopy test. According to Kemper, the tests showed the powder to be ephedrine. Kemper also stated that, before he did any initial testing, he took the initial weight of the powder and it weighed five point six (5.6) pounds [Appendix: 34].

The Eighth Circuit, in affirming the denial of Petitioner's §2255, stated that Petitioner failed to show any prejudice resulting from his prior counsel's failure to argue the amount of usable ephedrine because he did not rebut the testimony and test results. However, as set out in both the original appellate brief and reply brief, Kemper's own testimony clearly contradicted the fact that the entire 5.6 pounds of white powder was all usable ephedrine.

Given that the process of soaking the ephedrine out of the ground-up tablets was taking place, and not completed, when the jars were seized, the amount of

usable ephedrine would have been in the solution, after filtering and drying. This was not what occurred. Kemper stated that he took all of the white powder from the jars and then dried the powder down for a weight determination. As such, what constituted the 5.6 pounds of white powder was a combination of ephedrine and other "filler" ingredients. Since Kemper failed to ascertain the amount of usable ephedrine in the powdery mixture, the calculation of the amount of methamphetamine that could have been produced was erroneously inflated to 1.9 kilograms.

As stated above, U.S.S.G., App.C. amend. 484 sets forth that "***[t]he chemicals seized before the end of processing are also not usable in that form because further processing must take place before they can be used.***" Given the facts that Amendment 484 became effective November 1, 1993, well before Petitioner was sentenced, and prior counsel never challenged the fact that the entire 5.6 pounds of white powder constituted usable ephedrine, either at trial, during sentencing, or on direct appeal, it is clear that Petitioner's interests were not properly represented in this case.

The prejudice to Petitioner is equally clear in that, by using the entire 5.6 pounds of powdery substance, his sentence was significantly higher than what should have been properly calculated. As such, the district court's denial of Appellant's § 2255 Motion was in error.

Given the information above, the Eighth Circuit should have vacated and remanded the decision of the district court so, at the very least, an evidentiary hearing on this matter could have been conducted in order to

ascertain the proper amount of usable ephedrine and, then, determine the amount of methamphetamine capable of being produced.

B. Methamphetamine v. Actual Methamphetamine

Petitioner also asserts that his prior counsel failed to properly present this issue to either the district court or the appellate court. At the district court level, while prior counsel raised the issue, he failed to support the argument by citing any authority to the proposition that the guidelines would be varied by the degree of purity that had been accomplished in the manufacturing process. Petitioner's sentencing hearing was held on March 10, 1994. As such, there existed pertinent case law, at that time, on the issue of methamphetamine purity and its relationship to the guidelines, specifically ***United States v. Carroll***, 6 F.3d 735, 743-46 (11th Cir.1993).

Furthermore, prior counsel never brought this issue before the Eighth Circuit on Petitioner's direct appeal. The direct appeal only contained two issues, neither of which went specifically to the type of methamphetamine for which Petitioner was sentenced. Instead, prior counsel only argued the issue of whether or not the ephedrine should have been included in the calculation of the base offense level. See ***United States v. Elliott***, No. 94-1717 (8th Cir.1994).

Therefore, while the Eighth Circuit's decision in ***United States v. Elliott***, No. 94-1717 (8th Cir.1994) may have properly addressed the inclusion of the ephedrine,

said decision had no bearing on the issues raised in the § 2255 Motion and subsequent appeal.

"The difference between methamphetamine and methamphetamine (actual) is highly significant for sentencing purposes: methamphetamine (actual) is subject to an offense level ten times greater than methamphetamine." ***United States v. Bogusz***, 43 F.3d 82, 86 (3rd Cir.1994)(citing, U.S.S.G. § 2D1.1, comment. (n.10)).

The only way to calculate the quantity of "pure" methamphetamine in determining a defendant's base offense level under § 2D1.1(c) is to multiply the purity of the mixture times the weight. See ***United States v. Carroll***, 6 F.3d 735, 746 (11th Cir. 1993).

Petitioner argues two points in support of the position that the speculated amount of methamphetamine (1.9 kilograms) was erroneously classified as methamphetamine (actual). First, methamphetamine, as produced through normal chemical processes, contains a number of impurities. ***Bogusz***, 43 F.3d at 87. See also ***United States v. Spencer***, 4 F.3d 115, 121 (2d Cir. 1993) (methamphetamine results from a "chemical reaction which yields a mixture of methamphetamine and various impurities"); ***United States v. Stoner***, 927 F.2d 45, 47 (1st Cir.) (methamphetamine "virtually never is pure"), ***cert. denied***, __U.S.__, 112 S.Ct. 129, 116 L.Ed.2d 96 (1991).

Second, as stated above, the 5.6 pounds of powdery substance consisted of materials other than usable ephedrine. If this entire weight is found to be a valid

calculation and, in turn, found to create 1.9 kilograms of methamphetamine, then it could not have made what constitutes "pure" methamphetamine because of the impurities in the ephedrine itself. Furthermore, as the 1.9 kilograms of methamphetamine was not seized but, rather only a speculated amount, the rule of lenity should have come into play.

The term "pure methamphetamine" is a misnomer and cannot be distinguished without a polarity test or other laboratory tests to determine how the process was initiated, that no mistakes were made, and that the type of methamphetamine produced was indeed alleged "pure methamphetamine" with absolutely no indications of any alternatives (D-methamphetamine, methamphetamine (actual), or even L-methamphetamine).

Once again, this argument was never properly presented by prior counsel, and the resulting prejudice was a more severe sentence being imposed upon Petitioner. Therefore, Petitioner submits that, based on the above, the district court further erred in denying the § 2255 Motion. As such, the Eighth Circuit should have vacated the district court's order so as to allow the proper determination of Petitioner's base offense level.

---------- ♦ ----------

CONCLUSION

Petitioner hereby respectfully moves this Honorable Court to approve his application for certiorari for the following reasons:

Given the fact that the trial testimony of the forensic chemist clearly contradicted the proposition that there existed 5.6 pounds of usable ephedrine, along with the language of U.S.S.G. Amendment 484, prior counsel was deficient in failing to argue against the assertion that all of the powdery substance was usable ephedrine, capable of making 1.9 kilograms of methamphetamine. Prior counsel was also deficient in failing to argue that the speculated amount of methamphetamine should not have been characterized as "methamphetamine (actual)".

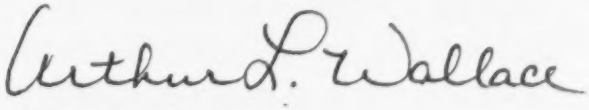
Had the proper arguments been set forth to the district court and/or the Eighth Circuit Court of Appeals, there exists a very real possibility that the sentence imposed upon Petitioner would have been significantly lower that what was imposed.

The failure of both the district and appellate courts to recognize the probability of a lesser sentence, had prior counsel made the asserted arguments, and to dismiss the § 2255 Motion without holding an evidentiary hearing on these matters, warrants reversal of the denial of Petitioner's § 2255 Motion.

Therefore, it is submitted that the Eighth Circuit failed to adhere to the precedent set forth by the United States Supreme Court, and entered a decision which not only conflicted with this Honorable Court, but with the

decision from other Circuits as well. As such, Petitioner, based on the facts and circumstances surrounding this case, should have the sentence vacated and remanded for further findings due to ineffective representation of counsel.

Respectfully submitted,



Arthur L. Wallace
Attorney for Petitioner

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 95-2894

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United
v.	*	States District Court for
	*	the Western District of
Stephen Byron Elliott,	*	Arkansas.
	*	[UNPUBLISHED]
Appellant.	*	

Submitted: April 3, 1996

Filed: April 18, 1996

Before FAGG, BOWMAN, and HANSEN, Circuit Judges.

PER CURIAM.

Stephen Byron Elliott appeals from the district court's[1]

---

[1] The Honorable Jimm Larry Hendren, United States District Judge for the Western District of Arkansas, adopting the report and recommendation of the Honorable Beverly R. Stites, United States Magistrate Judge for the Western

order denying his 28 U.S.C. §2255 motion to vacate, set aside, or correct his sentence. We affirm.

On direct appeal, we affirmed Elliott's sentence and conviction for manufacturing methamphetamine, in violation of 21 U.S.C. § 841(a)(1). United States v. Elliott, No. 94-1717, 1994 WL 378996 (8th Cir. July 21, 1994) (unpublished per curiam). Elliott then filed this section 2255 motion, arguing that counsel rendered ineffective assistance in failing to challenge the government's evidence on the total weight of ephedrine seized from Elliott's motor home, and in failing to properly challenge the projection as to the quantity of methamphetamine that could be produced from the ephedrine.

We review de novo the district court's denial of Elliott's section 2255 motion and, as it was denied without an evidentiary hearing, affirm only if the motion, files, and records conclusively show that Elliott is not entitled to relief.

District of Arkansas.

See United States v. Duke, 50 F.3d 571, 576 (8th Cir.), cert. denied, 116 S. Ct. 224 (1995).

To prevail on his ineffective assistance claims, Elliott needed to demonstrate that his counsel's "'representation fell below an objective standard of reasonableness' and that 'there is a reasonable probability that, but for counsel['s] unprofessional errors, the result of the proceeding would have been different.'" See Whitmore v. Lockhart, 8 F.3d 614, 616-17 (8th Cir. 1993) (quoted case omitted). Elliott did not show he was prejudiced by counsel's failure to challenge the weight of the ephedrine used to project the methamphetamine he was capable of producing, because he did not rebut the testimony and test results in the record showing that the substance seized from Elliott's motor home was a quantity of ephedrine capable of producing the amount of methamphetamine that was used in determining Elliott's sentence. Although Elliott also argues that counsel failed to properly challenge the characterization of the projected

amount of methamphetamine as "actual" methamphetamine, counsel raised the issue of the methamphetamine's purity at sentencing. We also note that, on direct appeal, we concluded the trial court correctly applied U.S.S.G. § 2D1.1, comment. (n.12), in approximating the quantity of methamphetamine Elliott was capable of manufacturing. See Elliott, 1994 WL 378996 at **1. We agree with the district court that Elliott failed to show counsel was ineffective.

Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,

EIGHTH CIRCUIT.

App. 5

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

UNITED STATES OF AMERICA
PLAINTIFF/RESPONDENT

v. Civil No. 94-2222
Criminal No. 93-20027-01

STEPHEN BYRON ELLIOTT
DEFENDANT/MOVANT

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Stephen Byron Elliott, an inmate at the F.C.I., Texarkana, Texas, brings this pro se motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence. We decide the issues by reference to matters in the file.

DISCUSSION

Elliott was convicted by a jury of manufacturing methamphetamine and sentence in March 1994 by Hon. Jimm Larry Hendren to 188 months imprisonment, five years supervised released, and a $5,000 fine.

Elliott argued on appeal that the district court should have suppressed evidence seized during searches and erred in

sentencing based on the quantity of methamphetamine capable of being produced form ephedrine seized at the laboratory scene. The Eighth Circuit found no error and affirmed in an unpublished opinion. *United States v. Elliott*, No. 94-1717 (8th Cir. 1994) (attached as "A").

In the instant motion, Elliott asserts that his defense counsel provided ineffective assistance at sentencing by failing to demonstrate that the substance seized at the laboratory scene and identified as ephedrine should have been excluded from the sentencing determination and failing to object when the court assumed the type of methamphetamine involved was d-methamphetamine rather than l-methamphetamine.

Relief is warranted on a claim of ineffective assistance of counsel when it is shown that counsel's performance was deficient and the movant was prejudiced by the deficiency. *See Strickland v. Washington*, 466 U.S. 668 (1984).

Inclusion of Ephedrine

The evidence at trial established that Elliott used a motor home as a mobile methamphetamine laboratory. The actual amount of seized methamphetamine was 47.15 grams. The presentence report (attached as "B") assigned a base offense level of 36 for 1947.15 grams (1.948 kilograms) of methamphetamine. The additional 1900 grams was included as "relevant conduct" under U.S.S.G. 1B1.3 based on trial evidence of the amount of ephedrine seized at the lab site that could have been used to make methamphetamine.

Norman Kemper, a forensic chemist with the Arkansas State Crime Laboratory, who participated in the search of the lab and seized samples, testified that Elliott manufactured methamphetamine by combining ephedrine, iodine, and red phosphorus with a yield of three-fourths pound of methamphetamine for each pound of ephedrine. While at the trailer, he seized, among numerous items, five-sixths pound of a white powder contained in several glass jars which tested

as ephedrine in a series of chemical screen tests, a Thin Layer Thromatrography test, and an Infrared Spectroscopy test. In his opinion, the ephedrine found in the jars was in the process of being used to make methamphetamine.

Kemper testified in part:

> A. When we opened the tool box up, initially the jars were as they appear here in the photography. They were covered with what appears to be paper towels -- moist. It was wet. This paper towel was secured with rubber bands.
>
> Q. How full would you say those jars were?
>
> A. That varied among the jars. Some of the jars were pretty full with white powder. Some of them didn't have much in them, and others had liquid in them.
>
> Q. What did the substance inside the jars look like?
>
> A. Well, the white powder appeared to be, as I just said, a moist white powder maybe with a layer of liquid on top.
>
> Q. And do you have an opinion as to why the mouths of those jars were covered with paper towels?
>
> A. I believe they were covered just to prevent spillage in the box that transported it.
>
> . . . .

Q. Mr. Kemper, did you take samples from those jars?

A. Not there at the site. I transported the tool box and the jars in the tool box back to the laboratory where I took samples there.

. . . .

A. Yes, sir. This is one of several bags of white powder contained inside this box. The white powder in the plastic bags is all the white powder that initially came out of the jars that were inside these containers right here. All I did was I removed the white powder from the jars. They were -- and dried them to get a drier weight of the powder. I then repackaged the powder in plastic bags and marked it with my initials, N.K., and then placed the plastic bags in the box and sealed it up with my tape and my initials on it.

. . . .

Q. When you first arrived at the motor home, did you say the physical condition of the ephedrine in the jars was?

A. They were wet. It was wet. The entire contents of the jars, even the jars themselves and the interior of the box was wet.

Q. What, if anything, did that indicate to you as a forensic chemist?

A. As an examination of that particular exhibit in relation to this particular method that's been discussed for making meth, it indicated to me that powder was

being soaked. The powder was possibly ephedrine and that the ephedrine was being soaked out of the powder into the liquid, in which time it would be transferred to another contained and dried down to be used.

Q. Are you familiar with the process where a pill called Mini-Thins are used?

A. Yes, sir.

Q. And do you have an opinion as to what is the process when you use Mini-Thins?

A. In some of the labs that we have seized here in Arkansas, Mini-Thins have been a source of ephedrine to make methamphetamine and in most cases, what the person would do was to grind the tablets up into a powder form and soak it in water. And the ephedrine is very soluble [sic] in water and it would go into solution. They would then filter that solution and dry that water down - dry the solution down until you get a white powder, which would be your ephedrine powder. And that would be the starting agent -- starting chemical to make the ephedrine.

Q. In you opinion, is that the process that was going on in the motor home?

A. Yes, sir.

Trial Transcript, 69-73.

Elliott objected to the PSI's inclusion of the ephedrine seized at the laboratory, arguing that the ephedrine did not contain any trace of methamphetamine and could not be considered a controlled substance under 2D1.1. The probation officer refused to revise the calculation, finding that defendant had converted ephedrine to actual methamphetamine and the amount of seized ephedrine which was used in an attempt to make actual methamphetamine should be considered as "relevant conduct" under 1B1.3.

At sentencing (Sentencing Transcript at 97-130), defense counsel made these arguments against inclusion of ephedrine in the sentencing calculation: the ephedrine did not contain even a trace of a controlled substance and should not be considered in calculating the base amount; the ephedrine should be counted as a precursor drug under 2D1.11 for the base offense level of 28 rather than under 2D1.1; and , even if ephedrine were properly considered under 2D1.1, the base offense level should be no more than 32 because a mixture

containing methamphetamine was involved rather than pure methamphetamine.

Judge Hendren found that calculation of the sentence under 2D1.1 was proper, citing *United States v. Evans*, 891 F.2d 686 (8th Cir. 1989), *cert. denied*, 495 U.S. 931 (1990), for the proposition that the quantity of ephedrine which could have been made into methamphetamine should be considered in determining the base offense level. Judge Hendren further stated there was no indication that the methamphetamine actually produced contained anything other than traces of chemicals necessary to its manufacture, and the methamphetamine that could have been produced from the ephedrine would be "essentially pure methamphetamine for sentencing purposes." (Sentencing Transcript at 118).

In the instant motion, Elliott first contends that his attorney failed to show that the white powder contained in the jars was not ephedrine. According to Elliott, the white substance was an inert binder or "buffers" left over from

soaking the ephedrine out of grounded tablets, and the liquid solution suspended on top of the jars was the actual ephedrine which should have been drawn off and weighed. As Elliott explains,

> once the over the counter tablets are grind [sic] up; placed in a jar with water; stirred up; the buffers of the over the counter tablets settle to the bottom of the jar as a white powder, the useable portion of the solution ephedrine rises to the top of the buffers as a liquid that must be drawn off and further process [sic].

Motion at 10.

Elliott argues that Kemper's testimony that the substance was ephedrine was unreliable because he failed to perform a quantitative analysis test to determine the identity of the powder and the exact amount of any ephedrine in the powder. He maintains that his counsel should have elicited testimony from Kemper or an independent chemist in support of his position as to the makeup of the white powder.

Elliott also contends that his counsel failed to urge application notes 1 and 12 to U.S.S.G. § 2D1.1 suggesting

that *United States v. Evans* is no longer good law. Elliott cites language in the notes that the court is to exclude, when considering the amount of a controlled substance involved, the "materials that must be separated from the controlled substance before it can be used" and the amount of controlled substance the defendant "was not reasonably capable of producing."

Elliott's assertions of attorney ineffectiveness are meritless. First, Kemper testified at trial that he weighed the white powder and performed several tests on samples of it. He positively identified the substance as ephedrine and gave its total weight. Next, application notes 1 and 12 of § 2D1.1 are not pertinent to this case. As explained by Kemper, ephedrine reacts with other chemicals to become part of the finished product of methamphetamine and the amount of ephedrine directly affects the amount of methamphetamine produced. *See also U.S.S.G. § 2D1.11* application note 7. Kemper's testimony explained the amount capable of being

produced and this is not an instance where the substance included materials that must be separated from the controlled substance prior to use, such as "waste water from an illicit laboratory used to manufacture a controlled substance." Further, the Eighth Circuit cited with approval *United States v. Evans* in upholding Elliott's sentence, indicating the case remains good law.

Type of Methamphetamine

Elliott claims his counsel failed to object at sentencing when the district court assumed, without a finding on the record, that d-methamphetamine was involved instead of the less potent l-methamphetamine. Elliott makes the bald assertion that "[t]he methamphetamine in the instant case possess [sic] by movant was L-methamphetamine." (Motion at 28).

There is no discussion in the record as to the type of methamphetamine involved. The government agrees that defendant's sentence was based on d-methamphetamine and

l-methamphetamine results in a lower base offense level. *See U.S.S.G. 2D1.1*, drug equivalency tables.

The government has provided an affidavit of Kemper as to the type of methamphetamine involved. Kemper states that on February 10, 1995, he conducted an analysis of the seized ephedrine, which proved to be l-ephedrine. He explains that "[t]he L-ephedrine I removed from the glass jars could be converted into 4.2 pounds or 1.9 liters of d-methamphetamine. D-methamphetamine is always produced when l-ephedrine is used in the manufacturing process." Kemper further avers that his analysis of the seized methamphetamine showed it was "d" methamphetamine.

Here, Kemper's affidavit establishes that the methamphetamine involved was d-methamphetamine. Therefore, Elliott's counsel had no reason to object to sentencing based on the type of methamphetamine involved.

CONCLUSION

Based on the above, we recommend that the instant motion be denied.[1] The parties have ten days from receipt of our report and recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. The parties are reminded that objections must be both timely and specific to trigger *de novo* review by the district court.

DATED this 23rd day of February 1995.

/s/ Beverly R. Stites
HON. BEVERLY R. STITES
UNITED STATES MAGISTRATE JUDGE

---

[1] "A federal court may dismiss a claim without an evidentiary hearing where the allegations are frivolous, where the allegation fail to state a constitutional claim, where the relevant facts are not in dispute, or where the dispute can be resolved on the basis of the record." *Urquhart v. Lockhart*, 726 F.2d 1316 (8th Cir. 1984).

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

UNITED STATES OF AMERICA

v. CIVIL NO. 94-2222
CRIMINAL NO. 93-20027-01

STEPHEN BYRON ELLIOTT

ORDER

NOW on this *31* day of May, 1995, comes on for consideration the report and recommendation filed by the Honorable Beverly R. Stites, United States Magistrate Judge for the Western District of Arkansas. On March 27, 1995, defendant/petitioner filed objections to said report and recommendation.

The Court has carefully reviewed and considered the report and recommendation as well as petitioner's objections. In his objections, petitioner states that he has no objections to the portion of the report and recommendation which discusses the type of ephedrine involved.

The Court has reviewed the trial testimony of Norman Kemper, a forensic chemist with the Arkansas State Crime Laboratory, since it is largely Mr. Kemper's testimony which petitioner addresses in his objections. The Court also reviewed the transcript of the sentencing hearing, where the issue of the amount of the substance seized at the laboratory scene was also discussed.

After considering the above, as well as the relevant law, the Court finds petitioner's objections to be without merit. The Court agrees with the Magistrate judge that sufficient testimony was elicited from Kemper relating to his weighing of the white powder and its identity as well as the total weight. Furthermore, there was sufficient testimony which explained the amount capable of being produced. Although petitioner's counsel did not rebut Kemper's testimony at trial, argument was made at the sentencing hearing relating to how the Court should determine the amount of methamphetamine involved. The Court relied upon the sentencing guidelines

and the relevant notes, as well as the case of ***United States v. Evans***, 891 F.2d 686 (8th Cir. 1989), ***cert. denied***, 495 U.S. 931 (1990), to determine the applicable sentencing range. The Eighth Circuit affirmed the Court's pre-trial rulings as well as this Court's application of the guidelines in an unpublished opinion, ***United States v. Elliott***, No. 94-1717, 1994 U.S. App. LEXIS 18119 (8th Cir. July 21, 1994), a copy of which was attached to the report and recommendation.

The Court has made a ***de novo*** review of this matter and determined that the report and recommendation is correct and should be adopted. Accordingly, the Court finds the motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence should be and hereby is denied.

IT IS SO ORDERED.

/s/_____
JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA

v.

STEPHEN BYRON ELLIOTT
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 93-20027-01

Mark Cambiano
Defendant's Attorney

THE DEFENDANT:
( ) pleaded guilty to count(s) _____
(xx) was found guilty on count(s) One
after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title/Sect	*Nature of Offense*	*Date Offense Concluded*	*Count Number(s)*
21 U.S.C. 841(a)(1)	*Manufacture of Methamphetamine*	*8-21-93*	*1*
18 U.S.C. 2	*Aiding and Abetting*	*8-21-93*	*1*

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐The defendant has been found not guilty on count(s) ____

and is discharged as to such count(s).

☐Count(s) _____ (are) dismissed on the motion of the United States.

☐It is ordered that the defendant shall pay a special assessment of $50, for count(s) One, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 430-11-6411

Defendant's Date of Birth: 09-14-53

March 10, 1994
Date of Imposition of Sentence

Defendant's Mailing Address:

Route 2, Box 524
Paris, AR 72855

Signature of Judicial Officer
Hon. Jimm Larry Hendren
United States District Judge
Name & Title of Judicial Officer

Defendant's Residence Address:

Same

This document entered on docket in compliance with Rule 32(b)(1) and Rule 55 FRCrP

on 03/11/94 by /s/

March 11, 1994
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 188 months.

The court makes the following recommendations to the Bureau of Prisons:

[xx] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
- [ ] at _____ a.m./p.m. on _____.
- [ ] As notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
- [ ] before 2:00 p.m. on _____.
- [ ] As notified by the United States Marshal.
- [ ] As notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL
By:_____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five (5) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

(xx) The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
( ) The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

(xx) The defendant shall not possess a firearm or destructive device.

1. Defendant shall comply with any referral for counseling, treatment, or testing for substance abuse, including urinalysis testing if referral is made by the probation office.

2. Defendant shall complete any payment of any unpaid balance of a court-ordered fine, if applicable, according to a schedule set forth by the probation office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $5,000. The fine includes any costs of incarceration and/or supervision.

[x] This amount is the total of the fines imposed on individual counts, as follows: Count One.

[x] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[xx] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

The fine plus any interest required shall be paid:

[xx] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[ ] in installments according to the following schedule of payments:

To be paid during the term of imprisonment with any unpaid balance to be paid during the term of supervised release according to a schedule set forth by the probation office.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

[xx] The Court adopts the factual findings and guideline application in the presentence report. The court overruled defendant's objections for the reasons set forth in Attachment A.

OR

The Court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 36
Criminal History Category: I
Imprisonment Range: 188 to 235 months
Supervised Release Range: 5 years
Fine Range: $20,000.00 to $200,000.00

[X] Fine waived or imposed below the guideline range, because of inability to pay.

Restitution: $ N/A

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[xx] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): SEE ATTACHMENT A

OR

The sentence departs from the guideline range

( ) upon motion of the government, as a result of defendant's substantial assistance.

( ) for the following reason(s):

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

UNITED STATES OF AMERICA

PLAINTIFF

v. 93-20027-01-03

STEPHEN BYRON ELLIOTT
and PAUL DAVID WRIGHT DEFENDANT

Before HONORABLE JIMM LARRY HENDREN, U. S. District Judge, as follows:

EXCERPT OF THE PROCEEDINGS
JURY TRIAL
January 3-5, 1994
Fort Smith, Arkansas

APPEARANCES:

Mr. Steven N. Snyder
U.S. Attorney's Office
P. O. Box 1524
Fort Smith, Arkansas 72902

ON BEHALF OF THE UNITED STATES OF AMERICA

Mr. P. K. Holmes
U.S. Attorney's Office
P. O. Box 1524
Fort Smith, Arkansas 72901

Mr. Mark Cambiano
Attorney at Law
108 South Moose
Morrilton, Arkansas 72110

ON BEHALF OF THE DEFENDANT, STEPHEN BYRON ELLIOTT

Mr. David L. Gibbons
Attorney at Law
P. O. Box 2092
Russellville, Arkansas 72801

REPORTED BY: Dianne T. Satterfield, CCC-CVR
Official Court Reporter
United States District Court
Western District of Arkansas
P. O. Box 1586
Fort Smith, Arkansas 72902

Proceedings reported by stenomask; transcript produced from dictation.

in the bathroom area in the RV.

Q. What was the condition of the jars that appear in that photograph when you found it?

A. When we opened the tool box up, initially the jars were as they appear here in the photograph. They were covered with what appears to be paper towels -- moist. It was wet. This paper towel was secured with rubber bands.

Q. How full would you say those jars were?

A. That varied among the jars. Some of the jars were pretty full with white powder. Some of them didn't have much in them, and others had liquid in them.

Q. What did the substance inside the jars look like?

A. Well, the white powder appeared to be, as I just said, a moist white powder maybe with a layer of liquid on top.

Q. And do you have an opinion as to why the mouths of those jars were covered with paper towels?

A. I believe they were covered just to prevent spillage in the box that transported it.

BY MR. SNYDER: Your Honor, we would move to introduce Government's Exhibit Sixteen which is a photograph of the jars.

BY MR. CAMBIANO: No objection.

BY MR. GIBBONS: No objection, Your Honor.

BY THE COURT: Thank you. It will be received without objection.

[Whereupon, Government's Exhibit 16 was received into evidence.]

BY MR. SNYDER:

Q. Mr. Kemper, did you take samples from those jars?

A. Not there at the site. I transported the tool box and the jars in the tool box back to the laboratory where I took samples there.

Q. Let me show you Government's Exhibit Seventeen, which is another photograph of what appears to be a box with a white jar and I'm going to show you this Group Exhibit Eighteen, which is kind of a denim box, a box with white powder, and a tool box. And first, I'd ask if you can identify the photograph?

A. Yes, sir. This is a photograph also taken by the Crime Lab personnel. It depicts the tool box with the jars and it also depicts this blue denim box and it has two jars of white powder in it, also.

Q. I'm going to hand you the cardboard box which is a part of Group Exhibit Eighteen and ask if you can identify that?

A. Yes, sir. This is one of several bags of white powder contained inside this box. The white powder in the plastic bags is all the white powder that initially came out of the jars that were inside these containers right here. All I did was I removed the white powder from the jars. They were --- and dried them to get a drier weight of the powder. I then repackaged the powder in plastic bags and marked it with my

initials, N.K., and then placed the plastic bags in the box and sealed it up with my tape and my initials on it.

Q. How about the rest of Group Eighteen, which is a denim bag and appears to be a tool box?

A. These are two items that I found in the RV that were depicted in the photograph previously mentioned. They both had my seal across here and I opened it up and sampled the contents inside, removed it and then resealed it with my initials.

Q. Did you perform any tests on the contents of the jars which are marked as Government's Eighteen which are contained in the brown paper box?

A. Yes, sir, I did.

Q. What tests did you conduct?

A. I performed a series of chemical screen tests and I also did Thin Layer Chromatography test and Infrared Spectroscopy test.

Q. What did those tests disclose?

A. The tests I performed on this exhibit showed the powder to be ephedrine.

Q. Did you weigh the ephedrine?

A. Yes, sir. Before I did any initial testing, I took the initial weight of the powder and it weighed five point six (5.6) pounds.

Q. When you first arrived at the motor home, did you say the physical condition of the ephedrine in the jars was?

A. They were wet. It was wet. The entire contents of the jars, even the jars themselves and the interior of the box was wet.

Q. What, if anything, did that indicate to you as a forensic chemist?

A. As an examination of that particular exhibit in relation to this particular method that's been discussed for making meth, it indicated to me that powder was being soaked. The powder was possibly ephedrine and that the ephedrine was being soaked out of the powder into the liquid, in which time it would be transferred to another container and dried down to be used.

Q. Are you familiar with the process where a pill called Mini-Thins are used?

A. Yes, sir.

Q. And do you have an opinion as to what is the process when you use Mini-Thins?

A. In some of the labs that we have seized here in Arkansas, Mini-Thins have been a source of ephedrine to make methamphetamine and in most cases, what the person would do was to grind the tablets up into a powder form and soak it in water. And the ephedrine is very soluble in water and it would go into solution. They would then filter that solution and dry that water down - dry the solution down until you get a white powder, which would be your ephedrine powder. And that would be the starting agent -- starting chemical to make that ephedrine.

Q. In your opinion, is that the process that was going on in the motor home?

A. Yes, sir.

Q. Let me show you this --

BY MR. SNYDER: Your Honor, I would to introduce Government's Exhibits Seventeen and Eighteen.

BY MR. CAMBIANO: No objection.

BY MR. GIBBONS: No objection, Your Honor.

BY THE COURT: All right, now. If I understand it right, Seventeen is a photo of --

BY MR. SNYDER: Yes, sir.

BY THE COURT: Okay. So that will be received without objection. And the Eighteen is a group exhibit of the card-board box with contents, the denim box and tool box?

BY MR. SNYDER: Yes, sir.

BY THE COURT: It will be received without objection. Thank you.

[Whereupon, Government's Exhibits Seventeen and Eighteen was received into evidence.]

BY MR. SNYDER:

Q. Let me show you Government's Exhibit Nineteen which is a photograph of what appears to be a heat lam. Is that what it is?

A. Yes, sir. This is another photograph taken by the Crime Lab personnel there at the scene depicting the heat lamp there. And this was located in the attached -- near the ceiling of the

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

93-20027-01/94-2222
No. 95-2894WAFS

United States of America, Appellee,	*	
	*	Appeal from the United
vs.	*	States District Court for
	*	the Western District of
Stephen Byron Elliott, Appellant.	*	Arkansas

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

April 18, 1996

A true copy.
ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT
MANDATE ISSUED
JUN 14 1996